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The State of Recusal Reform

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THE STATE OF RECUSAL REFORM

*Charles Geyh,**
*Myles Lynk,***
*Robert S. Peck****
*& The Honorable Toni Clarke*****

| | |
|---|-----|
| INTRODUCTION BY ALESSANDRA Baniel-Stark | 515 |
| REMARKS OF CHARLES GEYH | 515 |
| REMARKS OF MYLES LYNK | 519 |
| REMARKS OF THE HONORABLE TONI CLARKE | 527 |
| REMARKS OF ROBERT S. PECK | 531 |
| QUESTIONS AND ANSWERS | 534 |

INTRODUCTION BY ALESSANDRA Baniel-Stark

Thanks everyone for coming, staying, or however you got here for the second panel. I'd like to introduce our moderator for our second round of discussion, Charles Geyh. Professor Geyh served previously on the ABA as Director of its Judicial Disqualification Project. He has extensive expertise and experience in working to reform judicial campaigns. He is also Professor of Law at the Maurer School of Law at Indiana University, and we are delighted that he is here to lead our second discussion.

REMARKS OF CHARLES GEYH

Terrific panel today, and I will introduce the participants shortly, but I did want to begin with a history lesson. That is something I say advisedly, because we've got Jed Shugerman who will be presenting later, who might be the best in the business when it comes to the history of judicial elections, and so I don't presume. This is a session

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that deals with the issue of reform efforts, and I think one of the takeaways from the session is: it's bloody difficult. In my opening remarks I'd like to explain—or give context to help to explain—why it's so difficult. The best way to do that is to begin at the beginning and explain why disqualification has evolved in phases. It is not as though when one phase comes along the other one goes away; they sort of pile on, until now we are four piles deep, and we are trying to negotiate our way through that.

In the beginning there was a pretty substantial or firm presumption of impartiality where as far as the English common law was concerned, and I'm quoting Blackstone here, "The law will not suppose a possibility of bias or favour in a judge, who is already sworn to administer impartial justice, and whose authority greatly depends upon that presumption and idea."¹ Period. Full Stop. As to bias in judges, it doesn't happen. Moving on. Now, I think part of that was that we differentiate fact-finding from law, and when it comes to facts, we will worry about bias in jurors, but as to law, we are going to entertain an opposite presumption. The one exception came in the early seventeenth century when Sir Edward Coke, in *Dr. Bonham's Case*,² said that a judge shouldn't be a judge in his own case, that in a situation where a judge was living off the fines he assessed, there was a conflict of interest that would disqualify him, but that was basically it. That's phase one—an ironclad presumption of impartiality with that one little exception.

We then move on, at about the time that the United States is getting underway, to a second phase that I would characterize as a "conflicts phase," where we are saying we're not going to get into the business of whether a judge is biased, but we're going to create a series of boxes—a checklist of conflicts—where if you check the box, out you go. So, in 1792, when Congress is getting into this, it enacts legislation³ that gradually evolves into section 455,⁴ which is the federal statute that we still have that codifies common law by saying judges must disqualify themselves if they have a conflict of financial interest, and also forces disqualification if the judge has been a lawyer for either party.⁵ In 1821, it added that if a relative appears before him,

1. 3 WILLIAM BLACKSTONE, COMMENTARIES *361.

2. (1610) 77 Eng. Rep. 638 (C.P.) 652.

3. Act of May 8, 1792, ch. 36, § 11, 1 Stat. 275, 278–79 (amended 1821).

4. 28 U.S.C. § 455 (2013).

5. See CHARLES GARDNER GEYH, FED. JUDICIAL CTR., JUDICIAL DISQUALIFICATION: AN ANALYSIS OF FEDERAL LAW 5 (2d ed. 2010), [http://www.fjc.gov/public/pdf.nsf/lookup/judicialdq.pdf/\\$file/judicialdq.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/judicialdq.pdf/$file/judicialdq.pdf) (discussing the evolution of federal law on judicial disqualification).

the judge is subject to disqualification.⁶ And later you have other conflicts being added: if the judge is a witness,⁷ if a family member has been a lawyer,⁸ and so forth and so on, until we wind up with a laundry list of conflicts decades in the making.⁹ We still don't get to the point where we are dealing with the issue of bias, because if a judge doesn't check one of these boxes, disqualification isn't possible.

We then head into a third phase beginning sometime in the middle of the nineteenth century where a handful of states start experimenting with disqualification for bias.¹⁰ Now as you might suppose, judges who have raised their right hands and sworn to be impartial, aren't likely to say, "Ah, you got me, I am biased as the day is long." And so what they tried to do in this third phase was experiment with procedural mechanisms to deal with this. Where, for example, if a party submitted an affidavit sufficient in alleging bias, some states required the judge to step aside automatically. In 1911, the federal government tried that with 28 USC § 144,¹¹ which is still on the books, but it's generally regarded as moribund because judges didn't particularly like the idea of being unable to defend themselves against allegations of bias coming from a party; the procedural rigors of § 144 effectively read the statute out of existence.¹² So this third phase of this procedural experimentation never really reached the status of a full phase, although some states continued to press on, creating mechanisms for peremptory challenge of judges in which a party could demand a one-time substitution of their assigned judge,¹³ and those efforts continue to percolate below the surface.

6. Act of Mar. 3, 1821, ch. 51, 3 Stat. 643.

7. Act of Mar. 3, 1911, ch. 231, § 20, 36 Stat. 1090.

8. Act of Dec. 5, 1974, Pub. L. No. 93-512, 88 Stat. 1609 (current version at 28 U.S.C. § 455(b)(5) (2013)).

9. See GEYH, *supra* note 5, at 9–11 (reviewing the disqualification rules set forth in § 455).

10. See generally JED HANDELSMAN SHUGERMAN, *THE PEOPLE'S COURTS: PURSUING JUDICIAL INDEPENDENCE IN AMERICA* 105 (2012) (describing the mid-nineteenth-century judicial reform movements across several states); Charles Gardner Geyh, *Why Judicial Disqualification Matters. Again.*, 30 REV. LITIG. 671, 682 (2011) [hereinafter Geyh, *Why Judicial Disqualification Matters*] (discussing the development of state-level jurisprudence on judicial disqualification for bias).

11. 28 U.S.C. § 144 (2013).

12. See GEYH, *supra* note 5, at 6.

13. See, e.g., CAL. CIV. PROC. CODE § 170.6 (West 2014) (providing a judicial disqualification framework involving peremptory challenges). See generally ALAN J. CHASET, *FED. JUDICIAL CTR., DISQUALIFICATION OF FEDERAL JUDGES BY PEREMPTORY CHALLENGE* 20–40 (1981) (providing an overview of state laws experimenting with peremptory challenges); Geyh, *Why Judicial Disqualification Matters*, *supra* note 10, at 683.

Then, finally, you get to phase four, which is the most recent. In the face of Watergate and in the face of the Vietnam War, there is this deep-seated loss of confidence in American government. At the same time, Richard Nixon nominates Judge Haynsworth to the Supreme Court, and he is rejected in part because he maintained interests in corporations before whom he heard cases, and the concern was that it created an appearance problem.¹⁴ So, in 1972, the ABA jumps in with what I think of as an appearance phase, where we introduce a new flagship disqualification standard where a judge must disqualify himself if his impartiality might reasonably be questioned.¹⁵ In 1974, Congress followed suit.¹⁶ And so, this standard connects with the matters before us today. Beginning with the '80s and '90s, we start seeing the politics of state judicial elections ramping up; we start seeing money becoming an issue in judicial elections; and we start seeing the question arise whether money in judicial elections triggers this new appearance problem, because we really don't have the conflicts-phase check-box to address the issues. And this is all occurring against the backdrop of an ancient presumption of impartiality that makes judges uncomfortable about even admitting to the possibility of bias.

So, in 1999, the ABA took its first crack at a disqualification rule for campaign contributions that no one paid much attention to for a couple of reasons.¹⁷ One was that it didn't include dollar amounts for disqualification. The other was that it didn't deal with the issue of independent expenditures, and so it was generally thought as not a terribly valuable rule to adopt.

Then along comes *Caperton*, which is the subject of this conference. As the previous panel articulated, it sets a constitutional floor for disqualifying campaign support.¹⁸ But the Court effectively extends an invitation: "if you do something above the floor, you can avoid us altogether. We don't want to be here. We are creating a cold-day-in-hell standard, and it has just dipped below thirty-two degrees, but it's not going to happen often, so why don't you just build a rule above the

14. See, e.g., Geyh, *Why Judicial Disqualification Matters*, *supra* note 10, at 688; Mary McGrory, *A Baffling New Nominee*, WASH. POST (Nov. 3, 1987), <http://www.washingtonpost.com/archive/politics/1987/11/03/a-baffling-new-nominee/9adcd3ee-d518-4a62-b805-04bb27ec224f/>.

15. CODE OF JUDICIAL CONDUCT Canon 3C(1) (1972) (AM. BAR ASS'N, amended 2011).

16. See GEYH, *supra* note 5, at 7 (observing that "[i]n 1974, Congress adopted, with some variations, the 1972 Model Code's disqualification rule in an amendment to [28 U.S.C.] § 455").

17. MODEL CODE OF JUDICIAL CONDUCT Canon 3E(1)(e) (1999) (AM. BAR ASS'N, amended 2011).

18. *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 872 (2009).

floor.” There have been some efforts in that regard, and the ABA has been trying for several years. But part of the reason it is hard is because judges understandably take their jobs seriously; they believe themselves to be impartial. Even accusing them of an appearance of bias is something they are reluctant to concede, because they understand that since the 1924 Canons of Judicial Ethics¹⁹ were adopted, they are to avoid appearances of impropriety.²⁰ Being accused of looking bad, when they don’t think they looked bad, creates the kind of stress point that makes this issue very, very complicated.

To discuss the stories that have gone behind the ABA’s efforts to regulate this area, the good efforts that have been tried, those that succeeded and those that haven’t, we have a panel that includes an extraordinary judge, an extraordinary scholar, and an extraordinary lawyer. The first, who will be introducing the ABA’s efforts, is Myles Lynk, who wears two hats—as a scholar at the Sandra Day O’Connor College of Law at Arizona State and as a lawyer who was deeply involved in the ABA process. He is followed by Judge Toni Clarke, who is an Associate Judge for the Seventh Judicial Circuit in Maryland, and who has been involved in the Judicial Division’s side of the ABA effort. She is followed by an old friend, Bob Peck, who is the president of the Center for Constitutional Litigation, who has been a longtime litigator in this arena and who was brought in to assist in the ABA effort. We will begin with the folks speaking and telling their stories in the order in which I have presented them. I will then give them each an opportunity to respond to each other, after which I will follow up with a series of questions.

REMARKS OF MYLES LYNK

Charles, thank you very much. My name is Myles Lynk. Let me say a couple of things. First, a disclaimer: I currently chair the American Bar Association Standing Committee on Ethics and Professional Responsibility. I want to make clear that my comments today are solely in my personal capacity, they are not made on behalf of the ABA, on behalf of the Standing Committee, or on behalf of the Center for Professional Responsibility, of which the Standing Committee is a

19. See, e.g., Dana A. Remus, *The Institutional Politics of Federal Judicial Conduct Regulation*, 31 YALE L. & POL’Y REV. 33, 41–46 (2012) (discussing the ABA’s 1924 judicial ethics rules in historical context).

20. See generally Raymond J. McKoski, *Judicial Discipline and the Appearance of Impropriety: What the Public Sees Is What the Judge Gets*, 94 MINN. L. REV. 1914 (2010) (exploring judges’ obligation to avoid “impropriety and the appearance of impropriety” (quoting CANONS OF JUDICIAL ETHICS Canon 4 (1924))).

part. During most of the activity that Charles referred to post-*Caperton*, I was chair of the ABA Standing Committee on Professional Discipline, which worked with the Ethics Committee but is a separate committee. My disclaimer applies to the Standing Committee on Professional Discipline, as well.

Caperton was decided in 2009, and beginning in 2010, the ABA tried mightily to pick up the gauntlet laid down by the Supreme Court in *Caperton* and modify the current ethics rules in the Model Code of Judicial Conduct regarding judicial elections.²¹ The Model Code of Judicial Conduct is just that: a model code. It is not intended to be applied verbatim in any jurisdiction; it simply provides a model, which jurisdictions can use and change or amend as they think best. Rule 2.11 ("Disqualification") in the Code includes the provision that deals with judicial disqualification. It states that "a judge shall disqualify himself or herself in any proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to the following circumstances,"²² and paragraph (A)(4) of Rule 2.11 relates to contributions made by a party or a lawyer who appears before the judge to the judge's election campaign.²³ Now, it is important to make clear that what the rule is intending to address is not the fact of a contribution, particularly because contributions are legal and legally authorized in most states. It is whether and when a contribution creates an appearance in which a judge's impartiality might reasonably be questioned. Sometimes there is a tendency to conflate the two, and I suggest we don't do that.

We also need to be very candid in our discussion today and point out that throughout this process between 2010 and 2014, the ABA's Judicial Division and the Conference of Chief Justices were adamantly opposed to any effort to amend the Judicial Code to address independent expenditures and to update Rule 2.11 to address the reality of campaign contributions today.²⁴ I think it's important that we not deny that fact; rather, what we need to do is understand why that fact occurred and the basis for their objections. Some of their arguments made sense and were valid, some did not and I think were simply throwaway efforts to discredit the process.

21. See MODEL CODE OF JUDICIAL CONDUCT (AM. BAR ASS'N 2011).

22. *Id.* at r. 2.11.

23. *Id.* at r. 2.11(A)(4).

24. See, e.g., John Gibeaut, *Show Me the Money: States, ABA Try to Figure Out When Campaign Cash Leads to a Judge's Recusal*, A.B.A. J. (Mar. 1, 2012), http://www.abajournal.com/magazine/article/show_me_the_money_states_aba_try_to_figure_out_when_campaign_cash_adds_up (describing the proposed revisions to the Model Code of Judicial Conduct as well as challenges for implementation).

Beginning in 2010, the ABA's Standing Committee on Judicial Independence, which was affiliated with the ABA's Judicial Division, began a process to try to look at these issues; it was joined by the Standing Committee on Ethics and Professional Responsibility when it became clear that the Standing Committee, which is housed within the Judicial Division, was simply not going to be able to address the ethics issues presented by *Caperton* or to update the Judicial Code rule relating to this issue. So, what they did, after a very full and intense process, was to propose a stand-alone rule which was adopted by the ABA in 2011, which proposed procedural steps for courts and judges to set forth how judges should deal with recusal motions that call on a judge to disqualify himself or herself from a case, when the basis of the recusal motion was contributions made to the judge's campaign either by a party or by a lawyer in the case.²⁵ That resolution also handed off the ethics issues to the Standing Committee on Ethics and to the Standing Committee on Professional Discipline for them to address and bring back to the House of Delegates.²⁶

So, those two entities, beginning in 2011 and working through 2013, worked to try to amend Rule 2.11(A)(4), and they developed a proposal to present to the ABA House of Delegates in 2013,²⁷ which received wide support within the Bar. This Resolution, numbered 108,²⁸ was consistent with positions that had been publicly adopted by, for example, the Bar Association of the City of New York, which had previously highlighted the need to deal with considerations such as aggregate funding.²⁹ The resolution also addressed one of the most central issues in this debate, and that is imposing an actual knowledge

25. See AM. BAR ASS'N, STANDING COMM. ON JUDICIAL INDEPENDENCE, REPORT TO THE HOUSE OF DELEGATES (2011), http://www.americanbar.org/content/dam/aba/administrative/judicial_independence/report107_judicial_disqualification.authcheckdam.pdf (providing numerous proposals as to procedures that states could use to promote judicial independence); see also Mark I. Harrison, *Can We Allow Justice to Become a Saleable Commodity?*, YALE L. & POL'Y REV. INTER ALIA (Mar. 5, 2012, 2:30 PM), http://ylpr.yale.edu/inter_alia/can-we-allow-justice-become-saleable-commodity (discussing the steps that the ABA has taken in recent years to address the problem of judicial independence).

26. AM. BAR ASS'N, *supra* note 25, at 13 n.48.

27. MODEL CODE OF JUDICIAL CONDUCT r. 2.11 (AM. BAR ASS'N, Proposed Draft 2013).

28. *Id.*

29. See Letter from Roger Juan Maldonado, Chair, N.Y.C. Bar Ass'n Council on Judicial Admin., to John McConnell, Counsel, State of N.Y. Office of Court Admin. 3 (Mar. 29, 2011), <http://www2.nycbar.org/pdf/report/uploads/20072092-CommentsregardingProposedRule151dealingwithcampaigncontributions.pdf> (emphasizing the need to establish clear rules with respect to limits on aggregate contributions); see also *id.* at 3–4 (arguing that the proposed rule in question should more clearly limit automatic recusal).

standard—as opposed to an implication of knowledge by a judge—for an ethical violation, by stating that “no inference about a judge’s actual knowledge should be drawn solely from the fact that reports of campaign contributions or expenditures have been filed by individuals or organizations as required by law and may be available as public records.”³⁰ That is, in order to address one concern that judges had, which is that they didn’t want knowledge about a campaign contribution to be imputed to them simply because of public disclosure obligations, the proposed amendment included an actual knowledge requirement. But that still was not satisfactory to the judges. So, that process was supported by the Center for Professional Responsibility,³¹ and by bar associations, as I mentioned, and the Section of Business Law of the ABA,³² and on the other side of the spectrum the Section of Individual Rights and Responsibilities.³³ It had wide support, but it did not have support of the Judicial Division or the Conference of Chief Justices.³⁴

In the absence of that support, the decision was made to withdraw the proposal.³⁵ Had it been adopted by the ABA House of Delegates without that support, that would have been very problematic in terms of its implementation. Had it been presented to the House and been voted down, I suggest to you that would have been more problematic because it would have suggested that the American Bar Association was not able to address these issues. Subsequently, between

30. MODEL CODE OF JUDICIAL CONDUCT r. 2.11 (AM. BAR ASS’N, Proposed Draft 2013).

31. See AM. BAR ASS’N, RESOLUTIONS WITH REPORTS TO THE HOUSE OF DELEGATES 236 (2013) (listing the ABA Standing Committee on Ethics and Professional Responsibility and the ABA Standing Committee on Professional Discipline as the entities responsible for proposing Resolution 108, in a report submitted to the ABA House of Delegates for consideration at its 2013 annual meeting in San Francisco).

32. See AM. BAR ASS’N BUS. LAW SECTION, COMM. ON PROF’L RESPONSIBILITY, COMMENTS OF THE COMMITTEE ON PROFESSIONAL RESPONSIBILITY OF THE ABA BUSINESS LAW SECTION ON PROPOSED AMENDMENTS TO RULE 2.11(A)(4) AND RELATED COMMENTS OF THE ABA MODEL CODE OF JUDICIAL CONDUCT (2013), http://www.americanbar.org/content/dam/aba/migrated/cpr/ethics/021913_mccjc_rule_2_11_comments.authcheckdam.pdf.

33. Posting on Behalf of Steve Wermiel, Chair, Am. Bar Ass’n Section of Individual Rights & Responsibilities, to irr-council@mail.americanbar.org (July 25, 2013) (on file with the *New York University Journal of Legislation and Public Policy*).

34. See Statement from the Am. Bar Ass’n Standing Comm. on Ethics & Prof’l Responsibility & Standing Comm. on Prof’l Discipline Regarding Resolution 108 (July 30, 2013), http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/20130730_scepr_and_discipline_judicial_disqualification_closing_statement_final.authcheckdam.pdf (announcing the decision to withdraw Resolution 108, in part based on the recommendation of the Professionalism and Competence of the Bar Committee of the Conference of Chief Justices).

35. See *id.*

2013 and 2014, an effort in which Bob Peck served as sort of a moderator was put together with the Judicial Division, the Conference of Chief Justices, and the Standing Committee on Ethics to try and see if there was some compromise that could be developed, but there really was no compromise.³⁶ They simply did not want any ethics rule proposed. So, in 2014, the ABA adopted another procedural resolution, very similar in terms to Resolution 107—in fact, virtually identical in some respects and weaker, actually, than Resolution 107 in other respects.³⁷ One of the most telling sort of comments or criticisms going forward has to do with whether or not campaign contributions should themselves be the subject of required disclosure or recusal by a judge.

So, in fact, the Wisconsin Supreme Court—and we'll hear from a former justice of that court later today³⁸—has adopted two provisions found in Rule 60.04 of the Judicial Code of the Wisconsin Supreme Court that I would like to address. Wisconsin Supreme Court Rule 60.04(7) provides that “[a] judge shall not be required to recuse himself or herself in a proceeding based solely on any endorsement or the judge’s campaign committee’s receipt of a lawful campaign contribution, including a campaign contribution from an individual or entity involved in the proceeding.”³⁹ Thus, when someone makes a lawful

36. *See, e.g.*, AM. BAR ASS’N, JUDICIAL DIV., TORT TRIAL & INS. PRACTICE SECTION, REPORT TO THE HOUSE OF DELEGATES ON RESOLUTION 105C, at 2 (2014) http://www.americanbar.org/content/dam/aba/administrative/house_of_delegates/resolutions/2014_hod_annual_meeting_105c.authcheckdam.pdf [hereinafter AM. BAR ASS’N, RESOLUTION 105C] (noting that “[i]n meetings held in Chicago in September 2013 and February 2014, representatives of the Standing Committees, the JD, and CCJ met to discuss possible approaches” following the withdrawal of Resolution 108).

37. *See id.* Resolution 105C, adopted by the ABA House of Delegates in August 2014, provides as follows:

RESOLVED, That the American Bar Association urges that states and territories adopt judicial disqualification and recusal procedures which: (1) take into account the fact that certain campaign expenditures and contributions, including independent expenditures, made during judicial elections raise concerns about possible effects on judicial impartiality and independence; (2) are transparent; (3) provide for the timely resolution of disqualification and recusal motions; and (4) include a mechanism for the timely review of denials to disqualify or recuse that is independent of the subject judge; and RESOLVED FURTHER, That the American Bar Association urges all states and territories to provide guidance and training to judges in deciding disqualification/recusal motions.

Id. at 1.

38. *See infra* pp. 549–86.

39. WIS. SUP. CT. R. 60.04(7). The Comment to this rule provides, in part: The purpose of this rule is to make clear that the receipt of a lawful campaign contribution by a judicial candidate’s campaign committee does not, by itself, require the candidate to recuse himself or herself as a judge from a proceeding involving a contributor. An endorsement of the

campaign contribution to the judge, that alone should not be the basis for a recusal. Well, in fact, the ABA Ethics Committee agrees completely with that position. In the proposal we made in 2013, our proposed Comment [9] to our proposed amendment to MJC Rule 2.11(A)(4) provided: “[t]he fact that a party or parties’ lawyer or law firm of a party’s lawyer has made a contribution to a judge’s election or retention election campaign, in an amount up to the limit allowed by law, should not of itself be a basis for the judge’s disqualification.”⁴⁰ In essence, that is the very same provision in both rules. We thought there should have been support for the rule, since we agreed with those states that take the view that a lawful campaign contribution, standing alone, cannot be the basis for disqualification, because to hold otherwise would vitiate the idea that such contributions are lawful. Rather, the question should be: taken in totality and looking at the aggregate of circumstances, is there an appearance of impropriety that should require the judge to recuse himself or herself?

The second relatively new provision that the Wisconsin Supreme Court has adopted, and which is applicable to judges in Wisconsin, relates to independent expenditures. One of the things we have seen, and which I’m sure most of you in this room have recognized, is the incredible growth of independent expenditures, so-called “dark money,” not just in elections for legislators and executives, but also for judges.⁴¹ So, in Rule 60.04(8) the Wisconsin Supreme Court provides that a judge shall not be required to recuse himself or herself in a proceeding where such recusal would be based solely on the sponsorship of an independent expenditure or of issue advocacy by an individual or entity involved in the proceeding, or a donation to an organization that sponsors an independent communication of an individual or entity involved in the proceeding.⁴²

judge by a lawyer, other individual, or entity also does not, by itself, require a judge’s recusal from a proceeding involving the endorser. Not every campaign contribution by a litigant or attorney creates a probability of bias that requires a judge’s recusal.

Id. 60.04(7) cmt.

40. MODEL CODE OF JUDICIAL CONDUCT r. 2.11 cmt. 9 (AM. BAR ASS’N, Proposed Draft 2013).

41. See generally Heather K. Gerken, *The Real Problem with Citizens United: Campaign Finance, Dark Money, and Shadow Parties*, 97 MARQ. L. REV. 903 (2014); Jeff Shesol, *Will the Roberts Court Strike Down Another Campaign-Finance Law?*, NEW YORKER (Jan. 19, 2015), <http://www.newyorker.com/news/news-desk/will-rob-erts-court-strike-another-campaign-finance-law>; CIARA TORRES-SPELLISCY, CORP. REFORM COAL., *THE SEC AND DARK POLITICAL MONEY: A HISTORICAL ARGUMENT FOR REQUIRING DISCLOSURE* (2013), <http://www.citizen.org/documents/sec-dark-political-money-history-report.pdf>

42. Rule 60.04(8) of the Code provides, in its entirety, as follows:

I would submit to you that handling independent expenditures, in the context of judicial recusal, is hugely important but also hugely difficult. The comment to Wisconsin Rule 60.04(8) is that “a judge should not be required to recuse himself on this ground, because any other result would permit a sponsor of an independent communication to dictate a judge’s non-participation in a case by sponsoring an independent communication.”⁴³ I think there is merit to that position. You don’t want people to say, “Well, if a judge will have to recuse herself because of independent expenditures made to her campaign, then I’ll make independent expenditures to her campaign, and I won’t have it be dark money because I will proudly trumpet that I made the independent expenditure, and then when I (or my party, or whatever) is before the judge, the judge will have to disqualify.” Again, I think it is important to note that the issue should never be the fact of a lawful contribution made in support of, or in opposition to, a candidate, whether or not it is contributed directly to the candidate. The issue should be whether, under the totality of the circumstances, the judge’s impartiality might reasonably be questioned.

As Charles indicated, one way to address that is to ask how much of a contribution might raise a reasonable question. If the individual contribution limit is \$1000, but you have a hundred-member law firm and every member of the law firm makes a contribution to the judge, does that raise a question of a reasonable possibility of influence when one of those lawyers appears before the judge, if those facts are known to the judge? No one is suggesting that these are easy issues, but what we are suggesting, what I am suggesting, is that it is important that we address these issues, and that the failure to do so, the complete stonewalling—and in fact, in his most candid moments, Bob will agree—by the Judicial Division and the Conference of Chief Justices to move the debate away from a set of ethical standards and ethical require-

(8) Effect of Independent Communications. A judge shall not be required to recuse himself or herself in a proceeding where such recusal would be based solely on the sponsorship of an independent expenditure or issue advocacy communication (collectively, an “independent communication”) by an individual or entity involved in the proceeding or a donation to an organization that sponsors an independent communication by an individual or entity involved in the proceeding.

Wis. SUP. CT. R. 60.04(8). The Comment to this Rule notes that “[a]ny other result would permit the sponsor of an independent communication to dictate a judge’s non-participation in a case, by sponsoring an independent communication. Automatically disqualifying a judge because of an independent communication would disrupt the judge’s official duties and also have a chilling effect on protected speech.” *Id.* 60.04(8) cmt.

43. *Id.* 60.04(8) cmt.

ments onto procedural norms and procedural rules. Why make the argument that we don't want an ethical rule here because one size doesn't fit all, when that argument could be made with respect to any Model Code provision? If you accept the argument that one size doesn't fit all—and by the way, that's true, so it is a red herring—in this ethics rule, you shouldn't have a Model Code of Judicial Conduct at all. Yet that argument is not made with respect to other Model Code provisions, so why was it made with respect to this provision?

I think that there are two reasons why it was made in this case. One, some judges are elected and some judges are not.⁴⁴ So if you have an ethics rule where one of the factors about what gives rise to reasonably questioning the judge's impartiality relates to contributions made to the judge's election campaign, that factor or that consideration will only apply to some judges—those in states where they are elected—and it won't apply to other judges. Unelected judges were reluctant to voice a view that was at odds with the view voiced by judges who were elected because they would be opining and supporting a provision which would not in effect apply to them. Within the ABA Judicial Division and within the Conference of Chief Justices, you had a sense of, “if the judges who are elected are affected by this, then we other judges are not going to push it.” And so, it did not get advanced.

So the next question is why are the judges who are elected so opposed to these proposed amendments to Rule 2.11(A)(4) of the Model Judicial Code? I think it's because, uniquely, this is an issue affecting a judge's role or impartiality, where many of the moving parts are factors over which the judge does not exercise control. Someone else is making the contribution. Someone else is making the expenditure. And the question is, under those circumstances, when should the judge's conduct, when should the judge's ability to sit on a case, be impaired? For a judge from a state that has elected judges, even the very title of a program such as this, “Courts, Campaigns, and Corruption”—as if you inevitably have corruption because you have campaigns—is anathema. I think for these judges, the notion that contributions from others may impair their impartiality, when on the other hand, they may not personally be soliciting such contributions but need to have them if they are in an election campaign, was an issue of great concern. Although it should be a great concern, I think the response to that is when you are a judge you are vested with incredible

44. See, e.g., AM. BAR ASS'N, JUDICIAL SELECTION: THE PROCESS OF CHOOSING JUDGES (2008) [hereinafter AM. BAR ASS'N, JUDICIAL SELECTION].

power, incredible authority, and incredible responsibility, and as such the public is entitled to know that you are exercising that power, responsibility, and authority in appropriate ways.

So, I would argue that while the concern is not without merit, I don't think the concern should be dispositive. But then again, I am not in the Judicial Division. So, this was a very hard-fought process, and it was a very engaged process, but I do think the process is not over. I do think there is a need to address the current landscape of campaign contributions to judicial elections, which is far different than it was even five or ten years ago. I think independent expenditures are a reality, and to ignore *that* reality is to ignore reality altogether. I don't think we should be in that business. Thank you very much.

REMARKS OF THE HONORABLE TONI CLARKE

Good morning. I'm going to give you a little bit of my background so you'll understand my perspective as I make some of my comments going forward. I am a judge on the Circuit Court in Prince Georges County, Maryland, which borders Washington, D.C., and not necessarily the better parts of Washington, D.C. I am a general jurisdiction judge, and I preside over every kind of case imaginable. We have a District Court in Maryland, which is the initial trial level, Circuit Court, which is the court that I am on, and that's the highest trial level, and we have one intermediate appellate court, and then we have the court of appeals.⁴⁵

Most, if not all, of our county's cases are assigned to a judge for trial the day before a case is scheduled. There are some exceptions: murder trials, I tracked five cases which are medical malpractice cases, complex litigation cases, and cases that will take four or more days to try. In Maryland, and I'm just giving you this by way of example, all judges are appointed by the governor.⁴⁶ On the district-court level they have to be approved by the state legislature.⁴⁷ On the circuit-court level we have to run in the next general election.⁴⁸ I just finished my second cycle of that last week. In Maryland we are not precluded from running as a group of sitting judges, and in fact our state bar association has really promoted the concept of sitting judges. However, certainly not everyone agrees with that, and people have run

45. See *About the Maryland Court System*, MD. CTS., <http://www.courts.state.md.us/courts/about.html> (last visited Sept. 1, 2015).

46. See *Judicial Selection*, MD. CTS., <http://www.courts.state.md.us/judgeselect/> (last visited Sept. 1, 2015).

47. MD. CONST. art. IV, § 41D.

48. MD. CONST. art. IV, § 3.

against judges, and judges have, in some instances, put out a lot of their own money and not raised funds for elections, and some of them lost and some of them were paying off second mortgages five to ten years after they lost the election.

Generally, in Maryland what we are permitted to do, and what we do, is we have a committee that will basically do any fundraising in the name of the city that is in the county in which they run. And so the way it works is that we schedule fundraisers, set whatever the rate is, and those of us sitting will go say hello and then leave.⁴⁹ So when they start talking about money, and that kind of thing, we're not as affected. Once elected, you're good for fifteen years in Maryland.⁵⁰

I am very active in a lot of bar associations. I am on the board of the National Association of Women Judges. I am on the board of trustees of the National Judicial College. And I have no fundraising responsibilities and there's no expectation that I raise funds. I am very active in the American Bar Association. I am active in some of their entities, and for those of you who are familiar you know there are a bazillion entities of the American Bar Association. One of them is the Judicial Division.⁵¹ There are six conferences within the Judicial Division. We have the Conference of Appellate Judges, the Conference of Federal Judges, the Conference of Specialized Court Judges, the State Trial Judges, which is the general jurisdiction conference—and I'm a member of and the immediate past chair of that conference—there's the Administrative Judges Conference, and there's the Lawyers Conference.⁵² Yes, there is a Lawyers Conference.⁵³ So any of you who might be interested—and you know there are a lot of things that judges who are currently presiding cannot comment on, there are a lot of issues that we cannot pursue—and so the Lawyers Conference was established as a component of the Judicial Division to assist and aid us in dealing with some of those issues. The Conference of State Trial

49. Cf. MD. JUDICIAL CAMPAIGN COMM., CAMPAIGN CONDUCT HANDBOOK 2014, at 11 (2014) (summarizing the Maryland Judicial Campaign Conduct Committee's standards for judicial election fundraising).

50. MD. CONST. art. IV, § 3.

51. See *generally About the Judicial Division*, AM. BAR ASS'N, http://www.americanbar.org/groups/judicial/about_us.html (last visited Sept. 1, 2015).

52. See *generally Conferences*, AM. BAR ASS'N, <http://www.americanbar.org/groups/judicial/conferences.html> (last visited Sept. 1, 2015).

53. See *generally Lawyers Conference*, AM. BAR ASS'N, http://www.americanbar.org/groups/judicial/conferences/lawyers_conference.html (last visited Sept. 1, 2015).

Judges is one of the oldest conferences—is the oldest conference within the Judicial Division and one of the largest.⁵⁴

As Myles indicated, there was a meeting in 2013 at the Annual Meeting in Chicago where we tried to work on resolutions that would work for everyone. Early on in the process before this 2013 meeting, when there were other versions of the resolution that were proposed, those versions of the resolution were developed without any member of the Judicial Division participating. Our perspective is not represented in some of the earlier versions of the resolution. So it really wasn't that we were opposed to any kind of rule or code that would assist us in dealing with this issue, because we all generally viewed it as a serious issue and one that needs to be, and needed to be, addressed. But what we were concerned about as a Judicial Division—and let me just say that yes, it is true that not every state has elections for judges; and I guess that was part of our concern, that we felt as though there was an attempt to have a one-size-fits-all rule, and it just doesn't. Again, yes, not every judge runs for election in this country, but I will say that once we were advised of the resolutions—which had already been proposed—we had members from every conference within the Judicial Division who were concerned about the language and how it would be implemented if the resolution were to go forward, and how it would be viewed and what would be required specifically of judges if the resolution had been approved in the way in which it was phrased initially.

Some of our concerns had to do with the expenditures and how the funds were raised prior to being contributed to the campaign. Some of the earlier versions, from our perspective, put a burden on judges to go behind the contribution and try to figure out where all the money came from.⁵⁵ It did not say “upon motion”; it basically put the burden on us to go forward and try to find out that information.⁵⁶ With the lack of resources that the judiciary generally has across the country, it seemed to be a burden that a lot of us could not take on. It would

54. See *National Conference of State Trial Judges: About Us*, AM. BAR ASS'N, http://www.americanbar.org/groups/judicial/conferences/state_trial_judges/about_us.html (last visited Sept. 1, 2015).

55. See, e.g., AM. BAR ASS'N STANDING COMM. ON ETHICS & PROF'L RESPONSIBILITY & STANDING COMM. ON PROF'L DISCIPLINE, HEARING 20–21 (2012) (transcript of hearing on potential amendments to the ABA's model rules dealing with judicial disqualification, in which the hearing participants discussed the possibility of a “rebuttable presumption” that a judge is aware of the sizes and sources of his or her campaign contributions).

56. Cf. *id.* at 20 (observing that the presumption could perhaps be “a useful tool in a hearing on a motion to disqualify”).

almost immediately put us in a position where we would be found potentially violating our judicial code, which would then put us in a judicial disabilities ethics category⁵⁷ as opposed to a procedural category where, if there were something in place where someone wanted to challenge us or the judge sitting on a particular case, she could present information regarding that.

Now, in Maryland for example, if that were a requirement, it would be next to impossible for us as judges in Maryland to go through and figure out all the levels of where those funds came from. Yes, we have reporting responsibilities,⁵⁸ but most of us don't do it ourselves. We have a treasurer, we look at the report, but in terms of whether law firm A contributes to the campaign—we don't know where the money came from that law firm A used. It could have come from clients; it could have come from you name it. We don't know the resources, and the way the resolution was phrased initially, it put the burden on us to make those inquiries, and certainly with the lack of resources we just didn't think that that was manageable.

So, from our perspective the resolution should have dealt with it from a procedural standpoint, not necessarily a code-of-conduct or an ethical standpoint, which is from the perspective of "if you don't do this, you're going to face judicial disabilities" instead of an appeal. So the question, obviously, and part of what we're going to talk about today, is: if we have the procedures in place, what should those procedures be? The leadership in the Judicial Division, members of the ad hoc committee that met in 2013, and others worked closely with the Conference of Chief Justices in developing the resolution that we have before us today, and it addresses the issue while being mindful that every state has a different procedure for how judicial elections are run and how disqualification and recusal issues are managed. It encourages each state and territory to develop a mechanism for addressing the issue and to train judges to do so. I think that's a really important component of it, because that's where the judge in the trenches has an opportunity to take a look at it from an academic standpoint and to look at what factors they should consider when presented with such a motion for disqualification based on campaign contributions. It would not only give us factors to consider, but it would also give us an opportunity for discussions on what kind of fact pattern would you have

57. Cf. Judicial Councils Reform and Judicial Conduct and Disability Act of 1980, 28 U.S.C. § 351–364 (2013).

58. See generally MD. GEN. ASSEMBLY COMM'N TO STUDY CAMPAIGN FIN. LAW, FINAL REPORT (2012) (discussing, inter alia, reporting requirements under Maryland's campaign finance laws).

to be presented with to get to this point where you have to disqualify yourself.

I certainly do not claim to be an expert on the topic, but I have some working knowledge of how this impacts the judiciary, and certainly based on my involvement with the Judicial Division and the American Bar Association, I will answer any questions as they are brought forward. Thank you.

REMARKS OF ROBERT S. PECK

Rather than rehash some of the inside baseball of the ins and outs of how the ABA considered or didn't consider various approaches, I'd like to bring us back to a couple of first principles. But, first, I will point out one thing. During the ABA debate, one of the problems that some judges expressed was that if recusal were simply made a part of the ethical rules, at least where the propriety of recusal in any single instance is not clear and the judge denied a motion to recuse, but then on subsequent appeal it is learned that the judge should have recused, judges feared their next election opponent would accuse them of acting unethically by virtue of having made a decision on recusal that ultimately turned out to be wrong. So that was a factor in the debate within the ABA.

Moving to today, one of the difficulties we're having, and it's particularly odd in a retrospective that looks at *Caperton* five years afterward, is that we're somehow rehearsing the same issues from that time. That approach is generally said to be folly: that generals often fight the last war. They look at what happened before, and they try to adjust to that. Yes, new situations come about. As my friend Myles mentioned, just ten years ago, everything was different. We're in a different world in judicial elections. Therefore, it is important for us to go back and understand that recusal that is not an end in and of itself—it's fair and impartial courts we're seeking. And so part of the question is: how do we achieve that? Obviously, recusal is one remedy to a potential perception of bias. It is a solution to something that we recognize—that because we can't assure fairness through other means, somehow this is part of the cure, although we know it's not a panacea. In fact, it's less than optimal. It's an imperfect remedy. On a doctrinal level, it deals with atmospherics, the perception of the public that someone is not getting a fair trial, because essentially it appears justice has been bought in this situation. But on a practical level, it's still not about a result. It's not that this person ought to win or that person ought to win; it's really about whether or not both parties feel like they got a fair shake. And so, therefore, that's just part of the equation, and

I think part of the discussion on this morning's earlier panel was about results more than impartiality.

Remember, the issue in *Caperton* was, with independent expenditures that were of an outsized amount, does this amount to a due process violation.⁵⁹ And while all the justices of the Supreme Court of Appeals of West Virginia said you could address this in canons and ethical rules, that does not address everything at stake.⁶⁰ Take, for example, Myles's hypothetical. There's a \$1000 limit per contribution, and 100 members of a law firm make that \$1000 contribution, so you have \$100,000 that has been contributed. Should that create a perception of bias when a lawyer from that firm eventually appears before that judge? Well, in *Caperton* we know that these were contributions directed to unseat a particular justice who the protagonist knew was likely to vote against him. So he worked to support someone that he thought he had a better chance of prevailing with.⁶¹

In some situations that fit the hypothetical, this law firm may be making this contribution because the person running for judge is a former associate of theirs who has gone into public service and whom they're very proud of. Though they have nothing pending in that court, maybe some years down the road they may have something before that court. In that situation, is there a perception of bias? I think that you know that that could be arguable. On the other hand, if that court is a court of appeals and the attorneys are going up immediately because either they want to sustain or they want to overturn a large verdict, then a different perception accompanies those contributions, and it has to be treated differently.

This is part of the difficulty in writing these kinds of rules with the precision that tells a judge "yes" in this situation and "no, you don't have to do it" in that situation. That's part of the trouble, but then you get into further trouble when we're talking about independent expenditures: what about issue advocacy, what about voter education campaigns, and what about the situation that Professor Sample talked about in the *Avery* case in Illinois in which, again, you essentially have money being potentially laundered through other organizations so that tracing where the contribution comes from is difficult, even if the contributions are precisely like the situation in *Caperton*,

59. *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 872 (2009).

60. *Caperton v. A.T. Massey Coal Co.*, 223 W. Va. 624, 695–98 (2008) (addressing the litigants' due process arguments).

61. See *Caperton*, 556 U.S. at 873.

to influence the ultimate decision?⁶² How do you treat that? And again, recusal is hard to see as a complete answer to that situation. In the *Avery* case, what the parties that are continuing to prosecute this issue of bias have done is hire a retired FBI agent to trace where all the money came from and put an extensive record before the court,⁶³ and the question is: is that still enough? That's not going to necessarily be answered by a hard-and-fast rule. Therefore, the suggestion that was made by Joan Claybrook⁶⁴—about disclosure laws being strengthened and that you ought to be able to look under the rug and see where the money comes from and allow everybody to make those decisions with full knowledge of what happened and not mere suspicions—makes great sense. So, in some ways, I think recusal has to go hand-in-glove with disclosure laws that are broad.

We know that in many instances, various organizations have been very proud that their “issue advocacy” has affected the outcome of both the political branches’ elections as well as judicial elections, and have bragged after the fact that it was their ads that made the difference.⁶⁵ Who knows whether they’re accurate about that or not, but the fact that they think that their issue ads, their “voter education efforts,” and things like that made a difference in an election is something that ought not be hidden. Basically, what I want to say is that we have to look at those issues as probably the next battle. If a Blankenship wanted to do today what he did,⁶⁶ or to have exactly the situation that went on before the West Virginia Supreme Court, in light of *Caperton*, the perpetrators would not straightforwardly make a three million dollar contribution through independent expenditures to unseat a justice and put someone else in their place; they would do it by

62. See *Avery v. State Farm Mut. Auto. Ins. Co.*, 835 N.E.2d 801 (Ill. 2005); see also *supra* p. 505.

63. See *Hale v. State Farm Mut. Auto. Ins. Co.*, No. 12-0660-DRH, 2013 WL 1287054, at *2 (S.D. Ill. Mar. 28, 2013); see also Billy Corriher & Brent DeBeaumont, *Dodging a Billion-Dollar Verdict*, CTR. FOR AM. PROGRESS, (Aug. 14, 2013), <https://www.americanprogress.org/issues/civil-liberties/report/2013/08/14/72199/dodging-a-billion-dollar-verdict/> (“Through the investigative work of retired FBI Special Agent Daniel Reece, the plaintiffs contend that as much as \$4 million given to Justice Karmeier’s campaign came from State Farm or entities strongly influenced by State Farm executives.”).

64. See *supra* pp. 506–08.

65. See, e.g., CTR. FOR LEGAL POLICY, MANHATTAN INST., JUDICIAL ELECTIONS: PAST, PRESENT, FUTURE 26–29 (2001), <http://www.manhattan-institute.org/pdf/mics6.pdf> (statement of Mr. Jim Wootton, President of the U.S. Chamber Institute for Legal Reform, endorsing the effective use of several ad campaigns against judges).

66. See *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 873 (2009) (describing the conduct of Don Blankenship, the then-Chairman and CEO of A.T. Massey Coal Company).

subterfuge. And they would do it in a way that was less traceable, and we would not be here to talk about it, and yet it is the same exact issue—they were motivated by an attempt to change which judge heard their case. That, again, goes to that fundamental issue of fair and impartial justice. In his final forward to *Democracy in America*, de Tocqueville wrote that “if the lights that guide us ever go out, they will fade little by little, as if of their own accord,” because we will have lost the meaning of practices that we now honor in the breach.⁶⁷

QUESTIONS AND ANSWERS

Questions from Charles Geyh to the Panelists

Charles Geyh:

Before I ask some questions to the panel, I wanted to give folks on the panel an opportunity to respond to each other.

Myles Lynk:

Yes, I'd like to respond. First of all, let me just—a point of personal privilege—I've met Judge Clarke in this process, and Bob Peck, and they're two of the great leaders in the ABA, and Judge Clarke is a judge in Maryland, and so it has been my pleasure to work with them, and I hope we have an opportunity to work on many other issues where we can be in concert in the future. With respect to Judge Clarke's comments, I ask you to note and remember that every objection she raised to the Resolution proposed by the Ethics Committee—Resolution 108—she raised to “earlier versions” of the Resolution, not the final version that was presented to the House of Delegates. Every comment she made—we objected to an earlier version because we hadn't seen it before; we objected to an earlier version because we included something—those earlier versions were in fact amended to respond to their objections.⁶⁸ In fact it was the final version that was presented to the House to which they still objected, even though, as I quoted, it contained language, which has been adopted in other states. In fact, in some of the deliberations and discussions with the Judicial Division representatives I had the distinct impression that some of the

67. ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 464 (J.P. Mayer ed., George Lawrence trans., Harper & Row 1969) (1835), *quoted in* ROBERT S. PECK, *WE THE PEOPLE: THE CONSTITUTION IN AMERICAN LIFE* 141 (1987).

68. Cf. *Response to Resolution 107 (August 2011)*, A.B.A. CTR. FOR PROF. RESPONSIBILITY, http://www.americanbar.org/groups/professional_responsibility/committees_commissions/ethicsandprofessionalresponsibility/mcjc_rule_2_11.html (last visited Sept. 1, 2015) (compiling the various versions of the document that formed the basis for Resolution 108).

people—and this was before Judge Clarke got involved—some of the people who we were working with didn't like the fact that the proponents of the amendments were so amenable to offering amendments, to being willing to amend, and Bob knows exactly the accuracy of what I am saying. They wanted something they could oppose, and despite the fact that they were willing to say "we want to work with you and we want to make this something that can work," they just threw up their hands and said, "We're not going to work with you at all."

On the point about disclosure, Ms. Claybrook's remark,⁶⁹ I agree with Bob that that is a good idea; and in fact, in 2011 in Resolution 107 the ABA adopted a procedural proposal, which included a requirement that a directory be maintained of lawyers and others who contribute to judicial election campaigns.⁷⁰ I think the thought was similar to the rules in some jurisdictions requiring judges to disclose their ownership of corporate securities in cases where companies are before them. Parties and lawyers should disclose when they've contributed to a judge before whom they are appearing. So the ABA adopted that policy in 2011.⁷¹

I agree with Bob that one of the challenges that judges have is, if you have an ethics requirement in their rule, and it's an arguable case and they rule that they shouldn't disqualify themselves—and let's suppose they're overturned on appeal—their opponent can jump on that and say they were unethical. That's an argument not in support of no ethics rules. That's an argument in support of a procedural process which makes those decisions be made by a judge other than a judge against whom the ethics charge was being made. And in fact, Bob was deeply involved in efforts of the ABA to adopt a procedural rule to achieve the procedural goal of saying "look, if this is an issue as to which a judge will face blowback in their campaign, we should take this issue—and also in order to ensure that the parties believe they've

69. See *supra* pp. 506–08.

70. See AM. BAR ASS'N, *supra* note 25; see also Adam Skaggs, Senior Counsel, Brennan Ctr. for Justice, Comments Regarding Proposed Amendments to the Model Code of Judicial Conduct Regarding Judicial Disqualifications Before the American Bar Association's Standing Committee on Ethics and Professional Responsibility and Standing Committee on Professional Discipline (Feb. 3, 2012), <http://www.brennancenter.org/analysis/testimony-aba-committee-judicial-disqualification> (discussing a potential amendment to the Model Rules of Professional Conduct that, pursuant to Resolution 107, would impose a duty on attorneys to report election spending).

71. AM. BAR ASS'N, *supra* note 25, at 13 ("[D]onors who are parties or are associated or affiliated with parties before the court (including counsel) must be required to make their own disclosures on the record.").

received due process—and we should move it to a different venue and have a different judge.” So that also has been addressed.⁷²

The issue is: where there’s this appearance of impropriety, what are the standards you use, and whether among the considerations that should be weighed are the amount of contributions or expenditures made to a judge’s campaign. There is no question that independent expenditures are difficult to deal with. Absolutely. *Citizens United* has opened a whole brave new world with respect to campaign contributions.⁷³ But simply because it’s difficult doesn’t mean we shouldn’t address it.

Bob said [that] in the context of the 100 lawyers who each contributed \$1000 to a campaign, whether or not that rises to the level of impropriety is an arguable issue. Bob, I agree with you—it’s arguable, you can go both ways—but here’s where we differ: I think it should be argued. I think that debate should be had, and if a party raises the issue, it should be decided on that basis.

Robert S. Peck:

I don’t disagree.

Hon. Toni Clarke:

I’m just going to say that my recollection of how things went as far as the resolutions and the prior resolutions is a little bit different than Myles’s recollection, but that’s of no consequence, or I should say no matter at this point because we’re trying to move forward and figure out how we’re going to deal with the issue moving forward. And certainly, I think that it should be addressed in terms of a procedure, and I think a lot of judges would welcome their states to look at the issue and come up with factors that judges should consider when presented with these kinds of motions—dealing specifically with campaign contributions, but certainly also with any kind of issue that is a question of whether the judge should disqualify him or herself from the process.

One of the things that we felt was important and of a concern in terms of resources was: where does a judge, and *how* does a judge, get that information? You know, if someone has filed a motion, they should have the information available to present to the judge. Is the burden on the judge to then go back and do all the research going back? I mean, if someone challenged a campaign issue for me, for

72. See AM. BAR ASS’N, RESOLUTION 105C, *supra* note 36, at 2–3.

73. *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310 (2010).

example, from my first go-around, that was fifteen or sixteen years ago. I don't even know if that information exists anywhere, and if so, I wouldn't know how to find it because that was before we had the Internet. This last go-around, no one challenged us in our county, but there were challenges in the state of Maryland.

So, I think that certainly we should welcome some sort of framework to evaluate these motions as they come forward. Where and how that's presented is a different issue, and I think it does have to be decided on a state-by-state basis, because every state deals with the issue differently. Even within states, some of the counties deal with the issue differently. So, I think we could find some procedures or, as the Resolution 105C suggests, some training exercises or something that gives a judge guidance when presented with a motion.⁷⁴ Certainly, making it a violation of ethics right off the bat is a problem for us, because some of this information is not always readily available, and, in fact, some states put things in place so the judge knows as little as possible about where the funds come from.⁷⁵

Charles Geyh:

I want to be forward-looking; where to from here? One question that occurred to me as the last couple of speakers were talking is—I'm trying to discern the difference between the ethics and the procedure issues. Borrowing a federal analogue, there is 28 U.S.C. § 455, which everyone understands is a procedural statute that dictates the essential elements of when a judge must disqualify himself, and it is nearly identical to Canon 3 of the code of conduct for judges,⁷⁶ which is the ethical component. And so, as we're looking for common ground, is it as simple as treating this as a matter of procedure on the theory that we don't want to call a judge a bad judge for getting it wrong, but we still are providing the same guidance? There is no state that has adopted the Model Code verbatim. Every state adopts variations to suit its needs, but the issue is: we shift it into a procedural forum where we're identifying essentially the same considerations. Only now the stigma of calling a judge a bad judge or unethical judge for violating them isn't in play, making the rule kind of like a corollary to Section 455. I don't even know if that's a possibility, but the more

74. See AM. BAR ASS'N, RESOLUTION 105C, *supra* note 36.

75. Cf. Fla. Bar v. Williams-Yulee, 138 So. 3d 379, 385–87 (2014) (discussing state requirements that candidates for judicial office fundraise using campaign committees, rather than through direct personal contact).

76. Compare 28 U.S.C. § 455 (2013), with MODEL CODE OF JUDICIAL CONDUCT Canon 3 (AM. BAR ASS'N 2011).

general question is: where to from here? How do we deal with the *Caperton* problem moving forward?

Myles Lynk:

Charles, if you're asking for comment from the panel, I have a brief comment. I think in *Caperton*, the Supreme Court thought that the states would address the issue in their ethics rules and that they would be more proactive in addressing the issue than they have been. I think you raise an interesting point: whether in addressing it, if it's more comfortable to address it as a procedural norm. As Judge Clarke has indicated, that may in fact be the case, to give judges direction as to how to handle these decisions. That appears to be the way, I think, that many states are going. That doesn't tell you what the judge's decision should be, it simply tells you how the state-court system should handle these charges when they're made. It strikes me that, in the ethics rule, when judges act in matters in which their impartiality is or might reasonably be questioned, there are consequences, and those consequences will arise when their impartiality might be questioned because of campaign contributions.

I don't think we can ever get away from that, and I think we do need effective procedures to help state court systems and judges address these issues. Absolutely, we are totally on board with that, and in fact in 2014, when the procedural proposal was made, there was no opposition to that proposal from the Center on Professional Responsibility or from any of its committees. In 2011, when a similar procedural proposal was made, the Ethics Committee co-sponsored the proposal. Proper procedures need to be in place to address these very tricky issues. The question is: is that enough? Are such procedures enough? I would suggest they are not—and that even without having specific ethics rules to focus on this sort of subset of conflict-of-interest issues, there would still be the ethical requirement that a judge not act when their impartiality will be questioned. And so, with respect to the courts, they have not avoided this issue, they have just failed to specifically address it.

Robert S. Peck:

Let me give a perspective on this as someone who litigates. I've had two experiences with recusal. One, where I made a motion to recuse in which the justice on that particular court eventually did recuse himself, but another one where I was asked to bring the case up to the U.S. Supreme Court. The Court ultimately did not take that case, but it points out some of the difficulty here. In this instance, a

case had been bouncing around in a federal district court for years, and suddenly the district judge presiding over the case passed away. It was inherited by a new judge on that court who was outraged to find out that a case in which he was originally a lawyer was still before that court—and on his own motion granted summary judgment for his former client and former law firm.⁷⁷ You think that would be as clear a violation of the rules as you could possibly have. They proceeded to appeal this case to the federal circuit court, which did say that he should have recused himself but found it to be harmless error, and that was the posture in which I inherited the case.⁷⁸ Obviously, the difficulty is that here, you have very clear direction on what was improper in this case, but there was really no way of obtaining relief for the party. If there had been a procedure where there was immediate independent review—something that we’ve discussed, and something that the Conference of Chief Justices have endorsed, and, in fact, since that resolution was passed by the Conference of Chief Justices in July, Arizona has adopted that⁷⁹—then, you get some answer, and you get the chance that the party who was on the receiving end of the decision that they think was so unfair gets some relief and gets before a judge who does not have any partiality. The party then can feel, regardless of the result, that they have had their fair day in court.

Charles Geyh:

Let me just follow up on that. If there is an impasse when it comes to coming up with details elaborating on the general standard—you must recuse yourself when your impartiality might reasonably be questioned—and we can’t come up with a consensus as to what the specific considerations ought to be when it comes to campaign support, how about, as a fallback, having the matter reassigned to a different judge who would then look at this independently? Or alternatively, as in about twenty states, at least at the trial-court level, a peremptory challenge procedure where you can have one crack at the judge and can remove him automatically without having to get in the judge’s grill and say, “you’re as partial as the day is long”?⁸⁰ I think Myles

77. See *Patterson v. Mobil Oil Corp.*, 335 F.3d 476, 481–82 (5th Cir.), *cert. denied*, 540 U.S. 1108 (2003).

78. See *id.* at 485.

79. See ARIZ. R. CIV. P. § 42(f).

80. See AM. BAR ASS’N JUDICIAL DISQUALIF. PROJECT, *Taking Disqualification Seriously*, 92 JUDICATURE 12, 15 n.39 (2008) (“States that permit peremptory challenges of at least some judges are: Alaska, Arizona, California, Hawaii, Idaho, Illinois, Indiana, Minnesota, Missouri, Montana, Nevada, New Mexico, North Dakota, Oregon, South Dakota, Texas, Washington, Wisconsin, and Wyoming.”).

would say that's not quite good enough, you need more guidance. But, failing our ability to come up with a consensus, what about it?

Hon. Toni Clarke:

Let me, if I may, comment on that. I think the next step in the scenario you gave, and I forget which state it is, but if you get the next judge on the rotation you don't get the automatic recusal. Then you have to file a motion and go through the process. But, I do think there is some merit to some sort of review more immediate than an appeal, because, as suggested in the report of 105C,⁸¹ why go through hearing the merits and then later on appeal finding out that that judge should not have presided? There's a lot of expense and cost that are associated with putting on trials—especially the more complex litigation cases where you have experts and all that and then you have to do it all over again. However, the question becomes, in those jurisdictions where you only have one or two judges, who are you going to have review it? Are you going to bring judges in from other jurisdictions? How easy would that be? I'm not saying I don't agree with some sort of process; I'm just saying these are some of the realities. There are judges in this country that literally go from county to county putting true meaning to the word of "circuit judge." That's one judge covering a lot of jurisdictions within a state, so it could become difficult. The other question is the timing on when such a motion gets filed. In jurisdictions where the judge gets the case the day before and they're not specially assigned, everybody is ready for trial, and then you come in and see who your judge is going to be. And it's like "whoops, this judge can't hear this case, because . . ." or the judge says "I can't hear this case because . . ." Who's going to get the case? Everybody in the courthouse has a case assigned that day. So there are some practical—I won't say problems, but some practical issues that would need to be addressed. But certainly, I think something short of going through the entire trial on the merits and then an appeal would be something that would make sense.

Robert S. Peck:

You know, there is no reason why that can't be at least one of the solutions. We do have that infamous case that once went to the Supreme Court involving Alcoa where all the Justices on the Court all owned Alcoa stock so none of them could sit, so Congress passed a

81. See AM. BAR ASS'N, RESOLUTION 105C, *supra* note 36, at 2.

special law designating the Second Circuit to sit in place of the Supreme Court in that one case.⁸²

Myles Lynk:

Just to follow up, I agree with Judge Clarke, and I would add there is the rule of necessity, which the ethics rules acknowledge.⁸³ Where a judge is the only judge, or one of very few who can sit on a case, the judge should sit on that case. There may be factors that the judge has to take into account, but the rule of necessity is: it is necessary in our system of democracy and jurisprudence that judges be available to hear cases. The other part of that is that judges should not have a duty to sit, and so judges should not easily recuse themselves simply because a party has made a motion. Your primary duty is to sit.⁸⁴ The assurance that we give in this democracy is to due process. You don't have an assurance to a particular result, but you have an assurance of due process. And what we want is a system in which the parties do feel they have due process, and the judge is sitting as they have been sworn to do. Where it is necessary, where there is no alternative, then you would have to have that judge sit on the case. But I also agree with both Judge Clarke and Bob Peck that procedural rules can help judicial systems, can help individual judges address the issues. It can give them instruction on how to handle these issues, and so I think they are necessary. Where we might disagree is whether they are sufficient, but they certainly are necessary.

Hon. Toni Clarke:

I would just add that there is also, across the country, this push for timeliness standards.⁸⁵ We have them in Maryland, and I know a lot of other jurisdictions have them, and that rule is that certain cases

82. *United States v. Aluminum Co. of Am.*, 148 F.2d 416, 421 (2d Cir. 1945) ("This appeal comes to us by virtue of a certificate of the Supreme Court, under the amendment of 1944 to § 29 of 15 U.S.C.A.").

83. *See, e.g.*, MODEL CODE OF JUDICIAL CONDUCT r. 2.7 cmt. (AM. BAR ASS'N 2011) ("Judges must be available to decide the matters that come before the court. Although there are times when disqualification is necessary to protect the rights of litigants and preserve public confidence in the independence, integrity, and impartiality of the judiciary, judges must be available to decide matters that come before the courts. Unwarranted disqualification may bring public disfavor to the court and to the judge personally.").

84. *Cf. GEYH, supra* note 5, at 12–13 (discussing the ways in which courts have balanced judges' duty to hear and decide cases against the need for judicial disqualification).

85. *See, e.g., id.* at 76–78 (describing federal circuit courts' different formulations of the timeliness requirement in federal disqualification laws).

have a certain time period from the date of filing within which they have to be concluded.⁸⁶ In Maryland, they publish that statewide, and so it's a concern. We're certainly not going to violate somebody's due process rights and all that, but it is very much in the forefront of all the judges' minds when they get a situation when they may not be able to hear a case—who's going to hear it? And do the parties get sent home because nobody is available to hear the case? And is there really truly a conflict, whether it's because of campaign contributions or any of the other disqualifiers that are in the rules?

Charles Geyh:

I want to open it up to questions. The last comment I would make is that in my experience, having worked on this issue for about ten years now, there is kind of an institutional conservatism. People fear change, and when it comes to adopting procedures that might relieve some of the burden on the target judge deciding their own motions, the places that have done the most have been western states for the most part. What's ironic to me is that oftentimes the concerns are about what are we going to do in more rural counties. The two jurisdictions that have done this successfully are Alaska and Montana.⁸⁷ They seem to make it work, and I think that it's important to be receptive to that kind of change, without disputing the fact that it's still a concern and it's still a legitimate concern. You have to weigh whether it is worth it, but it's still something that is manageable, including in remote places. I've been authorized to go a few minutes over to entertain questions from the group. Do we have any questions from the audience?

Question from an Audience Member to the Panelists

Audience Member:

Much of the tension in the development of what was discussed here related to the judges' concerns about the burden that would be placed on them and the threat of consequences from imputed knowledge, so I'm wondering, do any of you see potential for movement on

86. See, e.g., CAL. JUDICIAL ADMIN. STANDARDS Standard 2.2(f) (establishing time goals for the disposition of civil cases). See generally RICHARD VAN DUIZEND ET AL., NAT'L CTR. FOR STATE COURTS, MODEL TIME STANDARDS FOR STATE TRIAL COURTS (2011).

87. See ALASKA CODE OF JUDICIAL CONDUCT Canon 3(D) (2014) (requiring judges who are aware of a likelihood another judge has violated the professional code of conduct to "take appropriate action"); MONT. CODE OF JUDICIAL CONDUCT r. 2.16 (2009) (requiring that judges who have knowledge that another judge committed a violation of the Code of Judicial Conduct report the matter to the appropriate authority).

the other side—the lawyers, who are in the best position to know what contributions have been made? Is it possible to have any revisions to the Model Code of Professional Conduct for attorneys in terms of creating a responsibility in a particular case to disclose material contributions in support of or in opposition to a judge, and placing that burden on parties and lawyers?

Robert S. Peck:

I think that one of the difficulties with that is the weakness of the disclosure laws. You can have a client come to you and say, “well, we did not make any contribution to that campaign and we did not run any independent expenditures,” but if you dig a little deeper perhaps they contributed to someone who did make the independent expenditures and that sort of thing, so while you could have a rule like that, it will be incomplete, and it will not necessarily address the real problem.

Hon. Toni Clarke:

So you see that’s why it’s even more difficult for judges to do that.

Question from an Audience Member to the Panelists

Audience Member:

It seems to me this process can go on forever, and a lot of people are frustrated with the amount of time that these decisions take, including in the ABA, although you have made progress. I’m just wondering what you all think of having a rule of the court issued by the chief justice or the court itself as to the receipt of money by judges and its public disclosure. Because it does seem to me that if you say that a judge cannot receive money if it is not publicly disclosed as to the source of the money, that that might be a remedy that would work. It wouldn’t put pressure on the judges to find out about it, they just can’t take the money unless it’s actually on the record.

Hon. Toni Clarke:

That might work. I’d be willing to give it a shot, or—as someone on one of the earlier panels suggested—let’s just do away with elections. Do away with elections and we don’t have to worry about it.

Audience Member:

But in the absence of getting there?

Hon. Toni Clarke:

I think that's something, I guess, in some states that would probably work very well. I don't know if that would work across the board, but it certainly would be something that could be explored. It sounds reasonable to me.

Robert S. Peck:

I have the same problem I had with the previous question: that it still doesn't address independent expenditures, and I think a rule of court really makes it hard for the lawyers to do that.

Question from the Honorable Maureen O'Connor to the Panelists

Hon. Maureen O'Connor:

Just one question, are there jurisdictions where a judge can take money for a campaign and it's not disclosed? Is that possible?

Hon. Toni Clarke:

The difference is, in particular jurisdictions where the sitting judges run as a group, and someone goes to a fundraiser and it is the committee to elect the sitting judges, and people pay, let us say, \$100 for the ticket, and that's all the funds that are raised—the question in that scenario becomes, first of all, which judge do you attribute that \$100 to? If there are three judges, is that \$33.33 per judge?

Hon. Maureen O'Connor:

Well, how is it spent?

Hon. Toni Clarke:

It is typically spent, depending on whether there is someone running against the judges, typically it's spent to have your name put on the ballot, occasionally to run radio and television ads. I'm speaking now from Maryland, I'm not sure how it plays out, because in a lot of jurisdictions this is just a straight out campaign, it's not sitting judges versus someone who is challenging them. There are two vacancies and there are five people running for it, and that's just the way it is, and a vacancy could be considered a seat that a current judge is occupying. I think Texas is one that does that.⁸⁸ There are two seats, there may be a judge in both of those seats now, but when they run they just run for

88. See AM. BAR ASS'N, JUDICIAL SELECTION, *supra* note 44, at 7 fig.1.

the seats, and there are no sitting judges; it's just a full-out campaign. In California, if someone puts into run, they target which judge they're running against.⁸⁹ So conceivably, if the sitting judge is someone somebody has designated to run against, then they're out and they're getting funds and they know that money goes to them, but if you're in a situation where the judges are working together, and the sitting judges are working together, how do you know how much is going to which judge? It's not as straightforward as the question suggests.

Myles Lynk:

In some states, judges will say, "In our state, I don't know who's contributing to my campaign. I have a campaign committee. My treasurer is on the committee, and I am insulated in my state from that. So if you were to impose a disclosure requirement you're now imposing on me a knowledge that I don't want and which I otherwise would not have, and therefore, you are creating a situation where I might have to disqualify myself where I would not before." There are many good reasons for disclosure, but the incompleteness of it, the question of how to attribute contributions—and in states where judges are supposed to not know who is contributing to their campaigns, all of those reasons make it very difficult to implement such a system.

Hon. Toni Clarke:

In Maryland, we have a firewall, arguably. Yes, there is someone who reports on behalf of the sitting judges, but, again, it's a committee to elect the sitting judges.⁹⁰ Like I said, we go into a room if there's a fundraiser. When they start talking money, we leave.

Charles Geyh:

We've got time for one more question here.

89. CAL. ELEC. CODE § 8600 (Deering 2015); *see also* Editorial, *Safeguarding California's Judicial Election Process*, L.A. TIMES (Aug. 21, 2011), <http://articles.latimes.com/2011/aug/21/opinion/la-ed-judge-20110821> ("But judicial challengers have one more bite of the apple: They can mount write-in campaigns. They get 10 extra days after the filing deadline to target an incumbent judge.").

90. *See, e.g.*, COMM. TO RETAIN SITTING JUDGES MONTGOMERY CTY., MD., <http://www.crsjmd.com/> (last visited Sept. 1, 2015).

Question from Joy Howell to the Panelists

Joy Howell:

Joy Howell, I'm a public policy analyst in Washington and looking at money in elections. What about when the judge does know, to your point, Mr. Peck, about independent expenditures? In Illinois, I hate to say it, but I have to point to it again, I mean, Justice Karmeier recently just won retention by a very narrow basis.⁹¹ This group out of Washington, the Republican State Leadership Committee, basically took in \$230,000 in this election cycle, turned around and spent almost \$1 million to help Justice Karmeier win retention, which he did very narrowly.⁹² They received \$230,000 from Altria Philip Morris,⁹³ and the Philip Morris case is before the court right now.⁹⁴ What can we do about that, and how can we not say that that—I mean, doesn't it meet the standard of serious risk of actual bias?

Robert S. Peck:

Well, you know, Justice Karmeier, of course, denies that there were any direct contributions to his campaign, and that was the basis on which he says that there should be no reason for him to recuse.⁹⁵ To me, this is very much the same situation that Brent Benjamin faced, and recusal would be warranted. It'd be wise, and in the absence of anything in Illinois that makes that happen, you know, this is an instance again where the judge himself is the judge of whether he should recuse, and there is no review. I think the only other potential remedy is disclosure. Let people know about this. Let people react to it. Because, the fact is, if the purpose of all of this is to give the public confidence in the fairness of their courts, they have to know they have a role in making those courts fair, and that only occurs through disclosure.

91. See, e.g., Editorial, *Illinois Supreme Court Justice Survives Ballot Attack, But Others Will Be Wary*, CHI. TRIB. (Nov. 7, 2014, 7:15 PM), <http://www.chicagotribune.com/news/opinion/editorials/ct-karmeier-supreme-court-edit-1110-20141107-story.html>.

92. *Id.*

93. See Joseph Tanfani, *Judicial Elections Getting More Political with New Campaign Spending*, L.A. TIMES (Nov. 23, 2014, 6:00 AM), <http://www.latimes.com/nation/politics/la-na-judicial-elections-20141123-story.html>.

94. See Editorial, *supra* note 91.

95. Order Denying Motion for Recusal or Disqualification at 8, Philip Morris USA v. Appellate Court, No. 117689 (Ill. Sept. 24, 2014), http://www.state.il.us/court/SupremeCourt/SpecialMatters/2014/102114_117689_Order.pdf.

Myles Lynk:

Note, however, that disclosure alone, in the judicial election context, doesn't serve the same remedial function it serves when you're electing congressmen or legislators or others, because the judge is deciding particular cases regarding particular parties. A judicial decision has immediate impact and takes immediate effect. As we've heard, in many jurisdictions they're elected for not just two years or four years, they're elected for fifteen years. I think disclosure is necessary, but there should be—in fact, that case sort of suggests or indicates why there needs to be—some standard against which the judge and his colleagues and the community can measure his decision not to recuse himself. That standard should be: is it reasonable your impartiality would be impaired under these circumstances? And that's why I think you need a standard. Hopefully when it's there the judge will follow it, but if the judge doesn't follow it, I think the community should know that. I think that an ethical standard in addition to disclosure is just as important.

Hon. Toni Clarke:

One of the things, in particular with the appellate court—I would be curious to know in some of these cases whether they made these decisions in consultation with the other judges on their bench, or whether they just got the motion and decided that they weren't going to grant the motion. I'd be interested to know that, although it's hard to know.

Robert S. Peck:

Yes, well, my assumption, on the basis of those that I've talked to, is that it's different in different courts and different situations.

Charles Geyh:

On that cheery note, thank you.

